Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1995

SHIRLEY PERKINS, INDIVIDUALLY AND
ON BEHALF OF MICHAEL PENN
Petitioner,
v.
PATRICIA GUEY, ET AL
Respondent.

Petition for Writ of Certiorari
From An Appeal to the United
States Court of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether security, as required for a limitation of liability petition filed pursuant to 46 U.S.C. App. 185 and Supplemental Rule F, must be provided within the six month period prescribed by those statutes?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Shirley Perkins, individually and acting on behalf of her minor son, Michael Penn. Ms. Perkins was Claimant in the District Court and Appellant in the Court of Appeals for the Fifth Circuit.

2. Respondent, Patricia Ann Guey, was the complainant and cross-claimant in the District Court and the Appellee in the Court of Appeals for the Fifth Circuit.

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OPINIONS AND JUDGMENTS BELOW

On April 28,1993, the United District Court for the Eastern District of Louisiana entered judgment dismissing this limitation action for failure to post proper security. (Appendix page 12a)

Pursuant to a Motion for Rehearing, judgment was entered on May 10,1993, by the district court vacating its original order dismissing the limitation action. The district court ordered Guey to file a Motion for Partial Summary Judgment regarding the obligation of the insurer, Gulf Insurance Company, to post security. (Appendix page 17a)

On July 2, 1993, the district court entered judgment ordering Gulf Insurance Company to post the required security.

(Appendix page 32a)

On September 30, 1993, an order was entered by the district court requiring that a notice of the limitation action issue out of, and under the seal of, the district court against persons claiming damages for any and all losses arising out of the aforesaid accident. (Appendix page 34a) This order was amended by an order entered on October 15, 1993. (Appendix page 39a)

On May 9, 1994, Shirley Perkins, individually and on behalf of Michael Penn, filed a Motion for Summary Judgment, requesting that district court dismiss the limitation action because of the untimely filing of the required security.

On June 22,1994, the district court denied the Motion for Summary Judgment.

(Appendix page 32a)

The plaintiff appealed. On March 2, 1995, the decision of the United States Court of Appeals for the Fifth Circuit was entered, affirming the District Court. (Appendix page 1a)

JURISDICTION

The Judgment of the United States Court of Appeal for the Fifth Circuit was entered on March 2,1995. The Court of Appeals had jurisdiction under 28 USC §1292(a)(3). This petition is filed within Ninety(90) days after such Order as permitted by Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Actions for limitation of liability are governed by 46 U.S.C, App. 185 and Supplemental

Rule F.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this Chapter and the owner (a) shall deposit with the court, for the benefit of the claimants, a sum equal to the amount of the value of the interest of such owner in the vessel and freight, or approved security thereof, and in addition such sums, or approved security thereof, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security thereof, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements this section all claims and proceedings against the owner with respect to the matter in question shall cease. 46 U.S.C. App. 185.

Not later than six months after receipt of a claim in writing any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court for the benefit of the claimants, a sum equal to the

amount of value of the owner's interest in the vessel and pending freight. Supplemental Rule F.

STATEMENT OF THE CASE

On July 4, 1992, a pleasure boat owned by Patricia Ann Guey, and operated by Louis Butz collided with another pleasure boat operated by Scott Helmer. Michael Penn, a passenger aboard the vessel operated by Helmer, was seriously injured. Shirley Perkins, individually and on behalf of Michael Penn, brought suit against Guey and Butz in state court under 28 USC section 1333, alleging negligent entrustment by Guey; Perkins further claimed that Guey was liable under R.S. 34:851.18, a Louisiana owner liability statute.

Approximately two months later, on January 7, 1993, Guey brought a limitation of liability action pursuant to 46 U.S.C. 185 in the

liability action pursuant to 46 U.S.C. 185 in the United States District Court for the Eastern District of Louisiana. Guey did not provide any security with her complaint. She contended in her affidavit filed with the complaint that she did not have an "interest" in the vessel. Instead, she maintained that following the accident her "interest in the vessel" was zero since the amount she owed on the vessel exceeded its value.

On April 23, 1993, Guey filed a cross-claim against Gulf Insurance Company, which provided insurance coverage on the boat, arguing that Gulf must post security for the limitation action.

On July 2, 1993 the district court ordered Gulf to provide security for Guey's limitation action in the amount of any

outstanding liens on the boat. Gulf provided security on July 12, 1993, over an entire year after the petition for damages was filed by Shirley Perkins. The district court stayed all further proceedings pending the determination of the limitation proceeding.

On October 28, 1993, Perkins answered the complaint and filed a claim for damages in Guey's limitation action. On June 22, 1994, the district court denied Perkins' motion for summary judgment, which sought dismissal of Guey's limitation action on the grounds that she failed to post security within six months of receipt of notice. The district court denied summary judgment.

The Fifth Circuit Court of Appeals reviewed this denial of a motion for summary judgment and on March 2, 1995 held that

failure to post bond in an amount equal to the owner's interest in the vessel within six months following notice of claim was not jurisdictional. Petitioner now applies for this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case involves an important issue of federal law pertaining to the time constraints for the posting of security in a limitation action filed pursuant to 46 U.S.C. App. 185 and Supplemental Rule F. In the proceedings below, the Court of Appeal rejected petitioner's argument that the complainant in a limitation action must within six months post bond or transfer his interest in the vessel to obtain jurisdiction under Supplemental Rule F and 46 U.S.C. App. 185. The conflict between the Second and Fifth Circuits, and ambiguity in the

language of the statute and rule, justify granting writs in the instant case. Any ambiguous language in the relevant statutory provisions relating to limitation of liability should be resolved in favor of interpretations which increase the likelihood of recovery from the limiting vessel. ***Petition of the A.C. Dodge, Inc.***, 282 F.2d 86(C.A.N.Y 1960).

In rejecting petitioner's argument that the owner's interest in the vessel must be transferred or security posted within six months of receipt of the claim in writing, the Fifth Circuit held that the express terms of neither Supplemental Rule F nor section 185 require simultaneous filing of the complaint and posting of security. Petitioner contends that "within six months from receipt of the claim" the complaint for limitation must be filed and

security provided.

This position is supported by the generally accepted purpose of the 1936 Amendments to 46 USC App. § 185. The amendment changed the old rule which provided no time limitation for the filing of a limitation action . The new rule requires the ship owner to act promptly in asserting the right to limit his liability. ***Petition of Goulandris***, 140 F2d 780, at 781, and cases cited therein. The ship owner must file the petition and arguably post security within six months of receipt of the claim.

The right of the owner of a vessel to limit liability is wholly statutory. ***The Main v. Williams***, 152 U.S. 122, 14 S.Ct. 486, 38 L.Ed.381(1894). To avail himself of the right granted by the statute, the owner must bring

himself within the terms fixed by the statute. As stated by the Second Circuit in ***The Petition of Goulandris,*** 140 F.2d 780(2nd. Cir.1944) if the mere filing of the petition within six months is deemed compliance with section 185, "it is obvious that the purpose of the 1936 Amendment will be defeated." **Id.** at 782. The purpose of the 1936 amendment was to insure prompt action. This purpose is realized only when Section 185 and Supplemental Rule F are interpreted to mean that the petition must be filed, and security posted, within the six month statutory and rule period.

The Fifth Circuit labels ***Goulandris,*** a 1944, decision as "hoary." Yet, this characterization of ***Goulandris*** is seemingly inconsistent with the Fifth Circuit's reliance on

this Court's decision in ***Black Diamond***, a 1949 decision. Is ***Black Diamond*** to be deemed "hoary" in the next five years? In ***Goulandris,*** a petition for limitation was filed within the six month statutory period, and the petition was accompanied by a stipulation for costs in the amount of $250. However the petitioners did not within the six month period "deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel or freight, or approved security therefor", nor did the petitioners transfer their interest in the vessel. The Second Circuit dismissed the petition for limitation.

The Second Circuit noted that the purpose of the 1936 amendment to the statute which prescribed the six month period "was to

change the old rule, and require the ship owner to act promptly in asserting the right to limit his liability." 140 F2d at 781. The Second Circuit concluded that by allowing the petition to be filed without security, the purpose of the statute would be defeated. The Court stated that if the petition was allowed "the shipowner will be able to continue to litigate with adverse claimants, and then months or years later infuse life into the limitation proceedings by 'further application' to the court." 140 F.2d at 782.

At least one other court has apparently agreed with the reasoning of the ***Petition of Goulandris***, without specific reliance thereon. The Court "***In the Matter of the Complaint of COMPANIA NIVERNA MARISIA, SA***," 446 F.Supp. 900 (S.D.N.Y. 1979), stated that "***the***

petitioning shipowner must give security at the time of filing the complaint.. (Emphasis Supplied). This statement, however, is admittedly dicta.

The Fifth Circuit cites ***Oil Transport v. Verret***, 278 F.2d 464(5th Cir,1960), judgment vacated as moot 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83(1961), for the proposition that ***Goulandris*** is not applicable to the instant case. Though the court in ***Oil Transport*** holds that the failure to post bond within six months was not jurisdictional, the court there ignored the purpose of the amendment in applying section 185 and Supplemental Rule F.

Lastly, the Fifth Circuit's reliance on this Court's decision in ***Black Diamond***, 336 U.S. at 395, 69 S.Ct. at 627, is entirely misplaced. In ***Black Diamond***, this Court

merely found that an inadequate bond was not a jurisdictional defect. ***Black Diamond*** did not involve the jurisdictional implications of a complete failure to post bond. In fact, Supplemental Rule F(7) makes provision for the respondent to proceed by motion to obtain increased security.

CONCLUSION

This important issue of federal law should be resolved, and this petition for a Writ of Certiorari should be granted. The conflicting decisions in the Fifth Circuit regarding this issue of interpretation of section 185 and Supplemental Rule F justifies this court granting writs to resolve the ambiguity over the jurisdictional nature of the six month time llimitation. If anything is to be deemed "hoary," the Llimitation Act itself is most

deserving of such a designation. Vessel owners should be held to strict compliance with statutory requirements when seeking the broad relief provided for in the statute.

RESPECTFULLY SUBMITTED:

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 1995, a true and correct copy of the foregoing Petition for Writ of Certiorari with Appendix attached was mailed, postage prepaid to the following:

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VICTOR L. MARCELLO

APPENDIX A

PATRICIA ANN GUEY, as owner of the Baron (now known as the Hustler, C. G. La, 2317-E.J., seeking exoneration from or limitation of liability in re, Patricia Guey, Cross-Claimant-Appellee

v.

GULF INSURANCE COMPANY, Cross-Defendant-Appellee,

SHIRLEY PERKINS, Individually and on behalf of Michael Penn, Claimants-appellants

No. 94-30403.

United States Court of Appeals, Fifth Circuit.

March 2, 1995.

After vessel owner was sued for negligent entrustment and owner responsibility, for injuries sustained in collision, she commenced limitation of liability action. Claimant filed motion for summary judgment, seeking the dismissal of limitation action on ground that security was untimely posted. The United States District Court for the Eastern District of Louisiana, Edith Brown Clement, Judge, denied motion for summary judgment,

and claimant appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that failure to post bond in amount equal to owner's interest in vessel within six months following notice of claim was not jurisdictional.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before VAN GRAAFEILAND,* JOLLY and WIENER, Circuit Judge:

The question presented in this case is whether, under 46 U.S.C. App. § 185, in a limitation of liability proceeding, the failure to post bond in an amount equal to the owner's interest in the vessel within six months following notice of a claim is jurisdictional. We hold that it is not jurisdictional.

I

On July 4, 1992, a boat owned by Patricia Ann Guey, and operated by Louis Butz collided with another boat operated by Scott Helmer. Michael Penn, a passenger aboard the vessel operated by Helmer, was seriously injured. Shirley Perkins, individually and on behalf of Penn, brought suit against Guey and Butz in state court under 28 U.S.C. § 1333, alleging negligent entrustment and owner responsibility. Approximately two months later on January 7, 1993, Guey brought a limitation

of liability action under 46 U.S.C. App. § 185 in the United States District Court for the Eastern District of Louisiana. Guey did not post security equal to her "interest in the vessel" as set out in section 185. Instead, she contended in her affidavit filed with her complaint that her "interest in the vessel" following the accident was zero dollars because the amount owed on the boat exceeded its value. On April 23, 1993, Guey filed a cross-claim against Gulf Insurance Company ("Gulf"), which provided insurance coverage on the boat, arguing that Gulf must post security for the limitation action. On July 2, 1993, the district court ordered Gulf to provide security for Guey's limitation action in the amount of Guey's interest in the boat, without reduction by the amount of any outstanding liens on the boat. Gulf provided this security on July 12, 1993. [1] The district court then stayed all further proceedings pending the termination of the limitation proceedings. On October 28, 1993, Perkins answered the complaint and filed a claim for damages in Guey's limitation action. On June 22, 1994, the district court denied Perkins's

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*Circuit Judge of the Second Circuit, sitting by designation.

1 The district court originally dismissed without prejudice the limitation action for failure to post the post the proper security, but later vacated this judgment and ordered Gulf to provide the appropriate Security).

motion for summary judgment, which sought dismissal of Guey's limitation action on grounds that she, through Gulf, failed to post security within six months of notice of a claim, as allegedly required by 46 U.S.C. App. s 185. The district court denied summary judgment and held that although Guey and Gulf failed to post security within six months from the notice of the claim, "[s]ecurity was posted in a timely manner following the [district c]ourt's order" to do so. Perkins appeals.

II

A

[1, 2] We review a denial of a motion for summary judgment de novo, applying the same standard as that used by the district court. *GATX Aircraft Corp. v. M/V. Courtney Leigh*, 768 F.2d 711 (5th Cir. 1985). Interlocutory orders concerning the amount of security are appealable. *In re Talbott Big Foot, Inc.*, 854 F.2d 758, 760 (5th Cir. 1988).

B

Perkins contends that Guey's and Gulf's failure to post the required security within six months after receiving notice of Perkins's *480 claim requires the dismissal of this action. She argues that such a timely posting of security is required under both Rule F(1) of the Supplemental Federal Rules of Civil Procedure for Certain Admiralty and Maritime Claims and 46 U.S.C. App.§ 185, and thus is a jurisdictional prerequisite to this suit.

Rule F(1) provides that:

> Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court... for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel..., or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended...

Supp.Fed.R.Civ.P. F(1). This rule incorporates in substance 46 U.S.C. App. § 185, which states:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of a claim, may petition a district court... for limitation of liability within the provisions of

> this chapter and the owner (1) shall deposit with the court, for the benefits of claimants, a sum equal to the amount or value of the interest of such owner in the vessel...
>
> 46 U.S.C. App. § 185. Upon motion of the claimant, the court can increase the amount of security provided by the vessel owner on the ground that the amount provided is less than the vessel owner's interest in the vessel. Supp. Fed. R. Civ. P. F(7).

C

Together with her complaint, Guey filed Affidavits of Value establishing the value of the boat after the accident as $15,730.85, and the debt owed on the boat as $19,045.00. Because the debt owed on the boat exceeded its value, Guey took the position that her interest in the boat was zero. She, thus, posted no security in conjunction with her limitation of liability suit until the district court ordered her insurance provider, Gulf, to post adequate security. This posting of security occurred more than six months after the notice of initial claim. She argues that the district court cannot dismiss her case for inaccurately

estimating the value of her interest in the boat. In reliance on *Black Diamond S.S. Corp. v. Robert Stewart and Sons, Ltd.*, 336 U.S. 385, 59 S.Ct. 622, 93 L..Ed. 754 (1949), she argues that posting an inadequate bond is not a jurisdictional defect, and as such, the district court retains jurisdiction even though security is not properly posted. *Black Diamond,* 336 U.S. at 395, 69 S.Ct. at 627, 93 L.Ed. at 762.

D

[3] It is clear that neither Rule F nor Section 185 by their express terms mandate simultaneous filing of the complaint and posting of the security. Instead, the plain language of Rule F and section 185 requires that only the complaint be filed within six months following notice of a claim. The Advisory Committee Notes following Rule F support this straightforward and unalloyed reading of the Rule and state that Rule F(1) "make[s] it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner," but is silent as to any possible time limitations on the posting of security. Supp. Fed.R.Civ.P. F(1) advisory committee's note. Thus, our reading of the statute indicates that posting the bond within the six months following notice of a claim is not jurisdictional.

Although *Black Diamond's* facts are not identical to the facts of this appeal, we think this case fully supports a conclusion that the

posting of the security within the six-month period is not jurisdictional. The vessel owner, Black Diamond, filed a petition and actually posted security, but in an amount that was less than the value of the vessel. *Black Diamond*, 336 U.S. at 391, 69 S.Ct. at 624, 93 L.Ed. at 761. The district court dismissed the petition on the ground that Black Diamond had failed to file a bond in the proper amount, that is, in an amount equal to the value of the vessel. *Id.* at 391-93, 69 S.Ct. at 624-26, 93 L.Ed. at 761. The court of appeals affirmed the dismissal of the petition on essentially the same grounds assigned by the district court, although applying a different rationale. *Id.* at 392, 69 S.Ct. at 625, 93 L.Ed at 761. The primary question addressed by the Supreme Court was whether the limitation of liability statute permitted a concursus of all the claims against the vessel when the vessel owner did not concede that the total claims against the vessel exceeded its value, and, consequently, had posted a bond in an amount less than the value of the vessel. *Id.* at 389, 69 S.Ct, at 624, 93 L.Ed. at 760. The Supreme Court, in reaching its conclusion that Black Diamond was entitled to a concursus notwithstanding whether the total claims exceeded the value of the vessel, held that the inadequate bond was not a jurisdictional defect under section 185. *Id.* at 395, 69 S.Ct. at 627, 93 L.Ed. at 763. Although the vortex of the controversy in *Black Diamond* was not the six-month limitation period, as it seems to be in the case before us, and although Black Diamond posted some

security within the six-month period when Guey posted none, the clear legal inference to be drawn from the *Black Diamond* opinion is that Perkins has not raised a jurisdictional question in the case before us today.

Perkins argues, however, that to hold that the posting of the bond within the six-month period is not jurisdictional conflicts with the hoary Second Circuit case of *Petition of Goulandris*, 140 F.2d 780 (2d. Cir.1944). Although it is true that the district court in that case construed section 185 to require a ship owner to post adequate security within the six month prescribed period, the circuit court's holding was not so precise. *Petition of Goulandris*, 140 F.2d at 782. Writing for the court, Judge Swann observed that the petition for limitation there did not seek the customary and proper relief contemplated by section 185. *Id.* Instead, by refusing to surrender the vessel or to post adequate security, the vessel owners sought an indefinite postponement of the limitation proceedings until "further application by the petitioners." *Id.* Thus, the court of appeals fashioned a holding that was essentially fact specific to the case before it: "All we decide is that the petition as filed, with nothing further done within the six months, did not satisfy the statutory requirements." *Id.*

To be sure, our court has already determined that *Petition of Goulandris* does not stand for the proposition that the posting of the bond is jurisdictional. In *Oil Transport v. Verrett*, 278 F.2d 464 (5th Cir. 1960),

judgment vacated as moot, 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83 (1961)-- a case much like ours today-- the bareboat charterer and owner of a sunken vessel filed a limitation proceeding within six months, but, stating that the sunken vessel was worthless, failed to post any security within the six-month period. *Oil Transport,* 278 F.2d at 465. The trial court denied the petitioners benefit of the limitation statute because of their failure to post security within six months of the filing of a claim against the vessel. *Id.* at 466. The case presented the question of whether the failure to post adequate security within the six-month period of time was jurisdictional. *Id.* Judge Tuttle, writing for the court, held that when the vessel owner believes in good faith that the vessel is worthless, no bond need be posted to claim the benefits of the limitation of liability statute. *Id.* In reaching his conclusion, Judge Tuttle observed that Petition of Goulandris did not require as a jurisdictional prerequisite the posting of a bond in the good faith circumstances that he found in the facts before him.

[4] Before concluding, we should observe that although Rule F and section 185 impose no mandatory time limitations on the posting of a bond, clearly the better practice is to require timely posting of a bond, so that the litigation may be expediently resolved. The district court is free, and, indeed, is encouraged to exercise discretion and require prompt filing of the bond once the complaint is filed. The district court

surely may enforce such orders with the proper sanctions, including dismissal of the limitations proceedings, *in the appropriate case.* We only hold that under section 185 the simultaneous posting of security with the petition--or the posting of security within six months--is not a jurisdictional requirement.

E

[5] We conclude by observing that although Guey initially posted no amount of security, her boat insurer, Gulf, promptly filed an adequate bond when ordered to do so by the district court. We agree with the district court that in this case "security was posted in a timely manner following the [district c]ourt's order" to do so. Because we hold that posting security within the six months following notice of a claim is not jurisdictional requisite by the terms of Rule F and section 185 and because the court did not abuse its discretion in concluding that the security was otherwise timely posted, we AFFIRM the district court's judgment denying Perkins's motion for summary judgment.

III

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Apr 23 1 ₀₇PM '93
LORETTA G. WHITE
CLERK

UNITED STATES DISTRIT COURT

EASTERN DISTRICT OF LOUISIANA

The complaint of PATRICIA ANN GUEY as owner of THE BARON (now known as THE HUSTLER, C.G LA. 2317-E.J.), seeking exoneration from or limitation of liability	*	CIVIL ACTION NO. 93-61 SECTION "N"

ORDERS AND REASONS

On January 7, 1993, limitation plaintiff Patricia Guey filed a complaint for exoneration from or limitation of liabiity, pursuant to 46 U.S.C. § 183 and Fed. R. Civ. P. Supp. Rule F. Limitation plaintiffs are required to provide security "equal to the amount or value of the

DATE OF ENTRY APR 28 1993

owner's interst in the vessel and pending freight."

Fed. R. Civ. P. Supp. Rule F(1); 46 U.S.C. § 185.

Guey has not provided any security with her complaint. She contends that she does not have any "interest" in the vessel. She notes that she owes $19,045.00 to an unidentified mortgagee, an amount which exceeds her estimate of the value of the vessel. Guey contends that her outstanding debt to the mortgagee should be deducted from her interest in the vessel for purposes of determining the required security. Guey has in formed the Court that she was unaware of any legal authority supporting, or contradicting, this position.

The First Circuit held that:

> the 'value of the owner's interest' refers to the ship in specie, or to the owner's proportionate share thereof, and not simply to his equitable interest. (citations omitted)

Petition of Zebroid Trawling Corp., 428 F.2d 226, 228 (1st Cir. 1970). The court held that the owner of a vessel at the time of the casualty could file a limitation action despite the fact that the mortgagee had since foreclosed and taken possession of the vessel. Id. Because "[t]he right to limit claims to the value of the vessel applies only to the claims arising during the [casualty] voyage," it follows that the owner "cannot throw away security interests of [prior] lienors into the pot." Rodco Marine Services, Inc. v. Migliaccio, 651 F.2d

1101, 1106 (5th Cir. 1981), citing Zebroid Trawling, 428 F.2d at 228-29.

Consequently, Guey must submit a bond in the amount of her proportionate interest in the vessel, not simply her equitable interest. On January 8, 1993, the Court informed Guey's counsel of this security requirment, and that the Court could not allow her to persue this action without providing adequate security. Guey has since failed to submit security equal to her interest in the vessell. Accordingly,

IT IS ORDERED that limitation plaintiff's petition for limitation or exoneration from Liability is hereby DISMISSED without prejudice.

New Orleans, Louisiana this 22nd day of

April, 1993.

"s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
May 7 2 ..PM '93
LORETTA G. WHITE
CLERK

UNITED STATES DISTRIT COURT

EASTERN DISTRICT OF LOUISIANA

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DATE OF ENTRY MAY 10, 1993

owner's interst in the vessel and pending freight."

Fed. R. Civ. P. Supp. Rule F(1); 46 U.S.C. § 185.

On april 23, 1993, Guey filed a cross claim agianst her insurer, Gulf Insurance Company, which alleges, inter alia, that Gulf is obligated to provide security int his action. That cross-claim was entered into the record on April 26, 1993. Also on April 26, 1993, the Court dismissed Guey's limitation action for failure to provide security. That order was entered on April 28, 1993. Guey has filed a motion for rehearing based on her contention that Gulf is oblicated to provide security.[2]

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2 The court directs the parties' attention to New York Marine Managers v. Helena Marine Service,

In consideration of Guey's motion for rehearing,

IT IS ORDERED that the Court's Order of April 28, 1993, dismissing this action, is hereby VACATED;

IT IS FURTHER ORDERED that Gulf Insurance Company shall have until May 27, 1993 to file its responsive pleadings;

IT IS FURHTER ORDERED that Guey shall, not l ater than June 3, 1993, file a motion for partial summary judgment on the issue of responsibility for posting security in this action. Gulf's opposition memorandum is due on June 10, 1993. The Court will decide the motion on memoranda on June 14, 1993;

IT IS FURTHER ORDERED that the Court

---

756 F.2d 313 (9th Cir. 1985)

will not enjoin parallel proceedings until Guey or Gulf provides the security required by Rule F(1).

New Orleans, Louisiana, this 7 day of May, 1993.

s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Jul 2 8 10 AM '93
LORETTA G. WHITE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

The complaint of PATRICIA ANN GUEY as owner of THE BARON (now known as THE HUSTLER, C.G LA. 2317-E.J.), seeking exoneration from or limitation of liability	*	CIVIL ACTION NO. 93-61 SECTION "N"

ORDERS AND REASONS

Limitation plaintiff Patricia Ann Guey's motion for partial summary judgment on the issue of responsibility for posting security was considered this date on memoranda. For the reasons stated below limitation plaintiff's motion is GRANTED.

DATE OF ENTRY JUL 2 1993

BACKGROUND

The proceeding now before the Court stems from a tragic boating accident that occurred on or about July 5, 1992. The movant's vessel, a 1992 26' Targa Cruiser, collided with a skiff while operating on a navigable body of water in the Parish of Jefferson. The collision caused property damage, injury, and loss of life. The vessel was insured by Gulf Insurance Company (Gulf), for up to $300,000.00 per accident. After numerous claims were instituted against Gulf, pursuant to Louisiana's direct action statute, La. Rev. Stat. § 22:655, Gulf instituted a concursus action in the 24th Judicial District for the Parish of Jefferson. That court issued an order enjoining actions against Gulf outside of the concursus proceeding. As a condition of

the order, Gulf admitted liability for the full amount of the insurance coverage and deposited $300,000.00, the limits of its policy, with the Clerk of Court for the 24th Judicial District Court for the Parish of Jefferson.

Subsequently, Guey filed this action for exoneration from or limitation of liability pursuant to 46 U.S.C. Appx. 183 (a), which provides, in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, . . . for any loss, damage, or injury by collision . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

Fed. R. Civ. P. Supp. Rule F requires the limitation plaintiff to post a security deposit equal to the value of the owner's interest in

the vessel. Guey has estimated her interest at $15,730.85, but has not deposited that sum with the court. Guey contends that Gulf is obligated, as part of its duty to defend claims against her, to provide the deposit.

Gulf contends that its duty to defend Guey ended upon depositing the full extent of the insurance policy in state court. Gulf points out that the insurance policy provides that Gulf's duty to defend cases when the policy limits have been exhausted.

ANALYSIS

In Maryland Cas. Co. et al. v. Cushing et al., 347 U.S. 409 (1954), the Supreme Court held that a vessel's insurer could not relieve itself of its duty to defend the vessel owner by surrendering the proceeds of its

policy in a separate direct action against the insurer. The Court ordered that the direct action against the insurer be enjoined pending resolution of the limitation action, so that insurance funds would be available to protect the vessel owner. The Court reasoned as follows:

> [T]o permit direct action under the State [of Louisiana] statute would require that shipowners become self-insurers for liability risks in order to be sure of getting the full protection of the limitation legislation. In view of the fact that 'substantially all maritime risks are insured,' this sort of qualification would be completely inconsistent with the Limitation Act.

Id. at 419 (citation omitted). The rule of Cushing has recently been reaffirmed by the Fifth Circuit:

> Recognizing the problem, this court has safeguarded shipowner's policy rights in a direct action case by following Justice Clark's recommended procedure [as described in Cushing]. To avoid depletion of the owner's coverage, this court has required the limitation action to precede the direct action.

Magnolia Marine Transport v. LaPlace Towing Corp., 964 F.2d 1571, 1579 (5th Cir. 1992) (footnote omitted) (citing Guillot v. Cenac Towing Company, 366 F.2d 898, 905 (5th Cir. 1966)). Under Cushing, Gulf's decision to institute a concursus proceeding in state court cannot serve to deprive Guey of her right to insurance coverage.

Moreover, most courts to address the question have held that an insurer does not relieve itself of its duty to defend by merely depositing its policy limits into the registry of

the court. See e.g. Emcasco Ins. Co. v. Davis, 753 F.Supp. 1458, 1460 (W.D. Ark. 1990); Utah Power & Light Co. v. Federal Ins. Co., 711 F. Supp. 1544, 1554 (D. Utah 1989); Millers' Mut. Ins. v. Iowa Nat. Mut., 618 F.Supp. 301, 304-307 (D. Colo. 1985); Anderson v. United States Fidelity & Guaranty Co., 339 S.E. 2d 660, 661 (Ga. 1986). In the absence of clear policy language to the contrary, a settlement or Judgment in the amount of the policy limits is required to relieve the insurer of its duty to defend.

Gulf contends that the Court should follow New York Marine Managers v. Helena Service, 758 F.2d 313 (8th Cir. 1985) in which the Eight Circuit held that a vessel's insurer was not obligated to post security in a

limitation action. The court reasoned that requiring the insurer to pay the Limitation Act security would expose the insurer to liability in excess of its policy limit, as non-limitation claimants would continue to pursue the insurer in separate proceedings. The court also did not want to favor limitation claimants at the expense of other claimants.

The Court finds New York Marine unpersuasive. The New York Marine court failed to cite Cushing, which compels the admiralty court to enjoin all actions against the insurer during the pendency of the limitation proceedings, thus preventing the insurer from abandoning the vessel owner to insure herself in the limitation proceeding. Because direct actions against the insurer cannot proceed

during the pendency of the limitation proceeding, the insurer does not face any risk of exposure beyond its policy limits.

In this case, the insurance policy obligates Gulf to defend Guey and to pay "costs" incurred in defending Guey. See Gulf Insurance Policy, |Def. Exh. D. The policy further provides that these costs are not part of the $300,000 upper limit of liability. Id. The policy does not enumerate what specific costs are included or excluded, nor otherwise specify the parameters of Gulf's duty to defend.

"As a general principle of insurance law which is recognized in Louisiana and elsewhere, the insurance policy if uncertain in

who wrote it and should be read liberally . . . ." Walter v. Marine Office of America, 537F.2d 89, 94-95 (5th Cir. 1976) (footnotes omitted). See also Breland v. Schilling, 550 So.2d 609, 610 (la. 1989); Boudreaux v. ABC Ins. Co., 689 F.2d. 1256, 1260 (5th Cir. 1982). Construing the "duty to defend" clause against its drafters, the Court finds the cost of depositing security with the court is a cost of a defense, which Gulf is obligated to pay under the policy. To prevent Guey from bearing the burdens of self-insuring her vessel and providing for her defense, services for which she paid Gulf to perform, Gulf must provide security for this action.

CONCLUSION

For the reasons stated above,

IT IS ORDERED plaintiff Patricia Ann Guey's motion for partial summary judgment is GRANTED, and that Gulf Insurance Company is obligated to provide security for Guey in this limitation action.

New Orleans, Louisiana, this 7 day of May, 1993.

s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
CLEMENT, J.
June 18, 1994

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Jun 21 1 30 PM '94
LORETTA G. WHITE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE COMPLAINT OF PATRICIA ANN GUEY AS OWNER OF THE BARON (now known as THE HUSTLER, C.G LA. 2317-E.J.), SEEKING EXONERATION FROM OR LIMITATION OF LIABILITY	*	CIVIL ACTION NO. 93-61 SECTION "N"

Claimants have filed a motion for summary judgment, claiming that these proceedings must be dismissed because limitation plaintiff, Patricia Ann Guey, did not timely post security. The Court will not, at this time, address the tortured history of this case. Suffice it to say that the limitation proceeding

DATE OF ENTRY JUN 22 1994

was timely filed. Although the security was not posted within six months of the time that plaintiff was notified of the claim, the lawsuit was filed within that time. Following the institution of these proceedings, this Court ordered Guey's insurer to post security. Security was posted in a timely manner following the Court's order. Accordingly,

IT IS ORDERED that claimant's motion for summary judgment is DENIED.

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Sep 24 3 ∞ PM '93
LORETTA G. WHITE
CLERK

UNITED STATES DISTRICT COURT

STATE OF LOUISIANA

The complaint of PATRICIA ANN GUEY as owner of THE BARON (now known as THE HUSTLER, C.G LA. 2317-E.J.), seeking exoneration from or limitation of liability	*	CIVIL ACTION No.: 93-0061 SECTION "N"

****

ORDER IN RESPECT TO PROOF OF CLAIMS, DIRECTING NOTICE TO ISSUE AND ENJOINING SUITS

ORDER

A complaint having heretofore been filed herein by Patricia Ann Guey, owner of the vessel The Baron (now known as The Hustler, bearing Coast Guard Number CG LA 2317-EJ) praying for limitation of her liability pursuant to

DATE OF ENTRY SEP 30 1993

46 USC:183-185 and statutes supplementary thereto and amendatory thereof, and also contesting her liability independently of the limitation of liability claimed under said acts for any and all loss, damage or destruction resulting from the collision which occurred on or about July 4, 1992 as more fully described in the complaint and also stating the facts and circumstances on which such exoneration from or limitation of liability are claimed, and the owner having filed affidavits of value of said vessel in the sum of $15,730.85 and a cash bond having been posted with the clerk of this court in said amount.

It is now this 28 day of September, 1993 in the United States District Court for the Eastern District of Louisiana.

IT IS ORDERED, ADJUDGED AND DECREED:

1. That notice of issue out of and under the seal of this Honorable Court against persons claiming damages for any and all losses, damages or injuries occasioned by or resulting from the accident of July 4, 1992, as more fully described in the complaint filed herein, citing them to file their respective claims with the clerk of this Honorable Court and to serve on or mail to the attorneys for plaintiff a copy thereof on or before the 1st day of November, 1993, subject to the right of any person claiming damages aforesaid who shall file his or her claim under oath to controvert or question any other claim and with liberty also to any such person who answered the complaint.

2. That the aforesaid notice be published in the Times Picayune, a newspaper circulating in the City of New Orleans, State of Louisiana and otherwise provided by Supplemental Rule F for certain admiralty and maritime claims effective July 1, 1966, as amended, and a copy of the notice shall be served on the parties named in the eight paragraph of the complaint on or before the 1st day of October, 1993.

3. That the beginning or prosecution of any and all suits, actions or legal proceedings of any manner or description whatsoever against the plaintiff or the vessel The Baron (now know as The Hustler, bearing Coast Guard Number CG LA 2317-EJ) in respect of any claims arising out of or connected with the acts described in the complaint, the same

having occurred on or about July 4, 1992, be and they are hereby stayed and restrained until the hearing and determination of this proceeding.

4. That the service of this order as a Restraining Order may be made within this District in the usual manner and any other District by the United States Marshal for such District by delivering a certified copy of this order to the person or persons to be restrained or to their respective attorneys.

s/Edith Brown Clement
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
CLEMENT, J.
October 4, 1993

Filed
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Oct 5 3 43 PM '93
LORETTA G. WHITE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE COMPLAINT OF PATRICIA ANN GUEY AS OWNER OF THE BARON (now known as THE HUSTLER, C.G LA. 2317-E.J.), SEEKING EXONERATION FROM OR LIMITATION OF LIABILITY	*	CIVIL ACTION NO. 93-0061 SECTION "N"

IT IS ORDERED that this Court's order, entered on September 30, 1993 (Doc. # 19), be amended to provide that the notice required by paragraph 2 shall be served on the parties named in paragraph 8 of the complaint on or before the 1st day of November, 1993.

(2)

FILED

JUN -1 6 -1995

CLERK

NO. 94-1945

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHIRLEY PERKINS, INDIVIDUALLY AND ON BEHALF OF MICHAEL PENN
Petitioner,

v.

PATRICIA GUEY, ET AL
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM AN APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court was correct in allowing the vessel owner to maintain an action for limitation of liability when the vessel owner timely filed a complaint for limitation of liability together with an affidavit stipulating her interest in the vessel at zero, and the court subsequently ordered her insurer to post security, which was accomplished within ten days of the court's order?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Shirley Perkins, individually and acting on behalf of her minor son, Michael Penn. Ms. Perkins was claimant in the district court and Appellant in the Court of Appeals for the Fifth Circuit.

2. Respondent, Patricia Ann Guey, was the complainant and cross-claimant in the district court and the Appellee in the Court of Appeals for the Fifth Circuit.

3. Respondent, Gulf Insurance Company, Patricia Ann Guey's Underwriter, was the cross-defendant in the district court and Appellee in the Court of Appeals for the Fifth Circuit.

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STATUTES

Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A. 1,4,5,7,9

46 U.S.C.A. § 185 1,4,9

Sup. Ct. R. 10 5

OPINIONS AND JUDGMENTS BELOW

Respondent is satisfied with Petitioners presentation of the opinions and judgments of the district court and court of appeal.

GROUNDS OF JURISDICTION

Respondent is satisfied with Petitioners assertion of the grounds for jurisdiction of this Court.

STATUTORY PROVISIONS

Petitioners cite 46 U.S.C.A. § 185 in its entirety. Respondent concurs in the applicability of this provision.

Petitioner reproduces only a portion of Supplemental Admiralty and Martime Claims Rule F, 28 U.S.C.A. As such, Respondent cites below additional provisions of Rule F which are believed significant.

> **"Rule F. Limitation of Liability**
>
> **(1) Time for Filing Complaint; Security.** Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court

may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. . .

. . .

(7) **Insufficiency of Fund or Security.** Any claimant may by motion demand that the funds deposited in the court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of this statutes relating to claims in respect of loss of life or bodily injury; and, after notice of hearing, the court may similarly order that the deposit or security be increased or reduced.

. . .

STATEMENT OF THE CASE

On July 4, 1992, the vessel owned by Respondent, Patricia Ann Guey, was involved in an accident on a

navigable waterway in Jefferson Parish, Louisiana. The accident resulted in death of one, serious personal injury to others and property damage. Petitioner herein, Shirley Perkins, brought suit individually and on behalf of Michael Penn, seeking recovery for personal injuries suffered by Penn. Perkins' suit was filed in Louisiana State Court.

On January 7, 1993, within six months of the accident, and therefore clearly within six months "after receipt of a claim in writing," Guey filed a complaint for limitation of liability in United States District Court for the Eastern District of Louisiana. With her complaint Guey filed an affidavit stipulating that the value of her interest in the vessel was zero. This valuation was based on the post-accident value of the vessel and the amount due the vessel's mortgagee.

On April 23, 1993, Guey filed a cross-claim against the insurer of the vessel, Gulf Insurance Company, seeking a judgment requiring Gulf to post security in the event the district court determined security was owed.

On April 28, 1993 the district court dismissed Guey's limitation of liability complaint. This order was reconsidered and vacated on May 10, 1993.

On July 2, 1993, Gulf was ordered to post security in the limitation of liability action brought by Guey. Gulf posted security within ten days of the order, that is, on July 12, 1993. Petitioner Perkins answered Guey's complaint, filed a claim for damages, and moved for summary judgment seeking dismissal of the limitation action on the ground that Guey had failed to post security within six

months of receiving notice of a claim. The motion for summary judgment was denied and Perkins appealed.

The Fifth Circuit Court of Appeals affirmed the district court's denial of Perkins' Motion for Summary Judgment concluding that security had been posted in a timely manner. Respondent contends that this ruling is correct and that Petitioner's application for writ of certiorari should be denied.

SUMMARY OF THE ARGUMENT

The jurisprudence of the appellate courts and this Court has consistently held that 46 U.S.C.A. §185 and Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A. require only that the complaint and ad interim stipulation be filed within the six month period and that subsequent modification of the amount of security does not divest the district court of jurisdiction.

The statutory language contained in Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A., which incorporates and modifies 46 U.S.C.A. §185, evidences the legislative intent to comport with the jurisprudence allowing district courts to resolve disputes as to the amount of security required after the six month filing period has expired.

REASONS FOR DENYING THE WRIT

Respondent acknowledges that the issues involved in this case are important. Limitation of liability actions under 46 U.S.C.A. § 185 and Supplemental Admiralty

and Maritime Claims Rule F, 28 U.S.C.A. serve to protect the owner of a vessel from liability in excess of the value of the owner's interest in the vessel. However, the statutory provisions do not require that security be posted within six months in order to vest the court with jurisdiction. Neither is there a conflict among circuits regarding the interpretation of the statutory provisions. None of the considerations governing review on writ of certiorari contained in Sup. Ct. R. 10 are met.

The Petitioner contends that the Second Circuit decision of *Petition of Goulandris,* 140 F.2d 780 (2nd Cir. 1944), cert. den., 322 U.S. 755, 64 S.Ct. 1268, 88 L.Ed. 1584 (1944) conflicts with Fifth Circuit jurisprudence. This is not so.

In *Goulandris, supra,* the owners of a vessel filed a petition for limitation accompanied by a stipulation for costs in the amount of $250, but did not deposit with the court a sum equal to the value of their interest in the vessel. In fact, the *Goulandris* petitioners did not make any representations at all with respect to the value of their interest in the vessel. Instead, the petition prayed for relief only upon "the further application of the petitioners." *Goulandris,* 140 F.2d at 782. No security was posted even though the vessel clearly had significant value. The court, in an effort to prevent the limitation plaintiffs from evading the six month time limit, held they had not complied with the statute.

The facts of the instant case are distinguishable. Guey did not file a petition praying for the court to act only upon her further application. Along with her petition Guey

filed an affidavit supporting her estimate of the value of her interest in the vessel. There was no attempt in this case to evade or circumvent the six month time limitation. The petition and affidavit were filed within two months of receiving notice that a claim was being made. The Second Circuit clearly limited its holding in *Goulandris* as follows:

> "All we decide is that the petition as filed, with nothing further done within the six months, did not satisfy the statutory requirement." *Goulandris,* 140 F.2d at 782.

This Court, in *Black Diamond S.S. Corporation v. Robert Stewart & Sons,* 336 U.S. 386, 69 S.Ct. 622, 93 L. Ed. 754 (1949), held that where there is a dispute as to the amount of security required in a limitation proceeding, the district court retains jurisdiction and has discretion to enter appropriate orders regarding security. This Court stated that:

> ". . . remand to the District Court in order to give Black Diamond an opportunity to file a larger bond would have been a better course, since the defect was not jurisdictional, than affirmance of dismissal of the petition. (citations omitted)" *Black Diamond,* 336 U.S. at 395, 69 S.Ct. at 627, 93 L. Ed. at 763.

Oil Transport v. Verret, 278 F.2d 464 (5th Cir. 1960), judgment vacated as moot, 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83 (1961), directly addressed the issue presented in this case. The limitation plaintiffs in *Oil Transport,* as did Guey, submitted an affidavit stipulating that the value of their interest in the vessel was zero because the tug had

sunk. Subsequent to the expiration of six months from notice, the court ordered that $170,000 security be posted, finding that the value of the vessel had been miscalculated by plaintiffs. The court distinguished *Goulandris* on the ground that "the entire proceeding" in Goulandris "failed to comply with the requirements of the statute. . ." *Oil Transport,* 278 F.2d at 468. The court in *Oil Transport* held *Black Diamond* applicable, allowed the limitation plaintiffs to amend their stipulation, to post security and to maintain the limitation action. It is Respondent's position that *Oil Transport* and the Fifth Circuit's decision in the present case are not in conflict with decisions of any other circuit and are consonant with *Black Diamond.*

Additional support may be found in the Eleventh Circuit case, *Caribbean Sea Transport Ltd. v. Russo,* 748 F.2d 622 (11th Cir. 1984), modified on rehearing, 753 F.2d 948 (11th Cir. 1985). In *Caribbean Sea* the court was faced with facts substantially similar to those in Guey's case. The petition for limitation was filed on July 27, 1982. No security was posted because the vessel owner took the position that his interest in the vessel and her freight then pending was zero. On October 6, 1983, over one year after the original petition for limitation had been filed, the claimant brought a motion pursuant to Supplemental Admiralty and Maritime Claims Rule F, F(7), 28 U.S.C.A. and the district court ordered the plaintiff to post security in the amount of $112,000. The plaintiff appealed this ruling. At the time of the appellate court decision, no security had been posted. Despite this fact the limitation of liability action was allowed to proceed. *Carribean Sea* supports Guey's position that once a limitation of liability complaint is filed, the district court has and retains jurisdiction even

though the amount of security required is in dispute. A determination that the vessel owner may have miscalculated the value of his or her interest in the vessel does not compel dismissal of the limitation action or divest the court of jurisdiction.

Furthermore, Rule F(7) specifically allows claimants to contest the sufficiency of the security and explicitly grants the court the power to issue orders increasing the security. Rule F(7) does not contemplate and makes no mention of dismissal of the limitation action in the event posting of additional security is found necessary. Had Congress intended to prohibit a complainant from pursuing limitation whenever proper security has not been filed within six months, it could have enacted an explicit provision to this effect. But, this is not what Congress did.

Petitioner cites *In the Matter of the Complaint of Compania Naviera Marasia S.A.*, 466 F.Supp. 900 (S.D.N.Y. 1979) as an example of a court in agreement with the rationale of the *Goulandris* court. The timeliness of the posting of security was not an issue in *Compania Naviera*. The issue was whether the tendered security was valid. Petitoner cites a portion of a sentence from *Compania Naviera*, to wit:

> ". . . the petitioning shipowner must give security at the time of filing the complaint. . ."

Not only is this statement dicta, which Petitioner acknowledges, it is not related to the question presented in this case. The full sentence states:

> "The petitioning shipowner must give security at the time of filing the complaint; and the posting of proper security is a condition precedent to obtaining the injunctive relief order under Rule F(3)." *Compania Naviera*, 466 F.Supp. at 901.

The point of the court's statement is not that the limitation complaint should be dismissed if security is not posted at the time the complaint is filed, but that an injunction enjoining other proceedings against the limitation plaintiff will not be issued until security is posted. *Compania Naviera* supports the decision of the district and appellate courts in the instant case. The *Compania Naviera* court noted that security may be objected to, modified, and court ordered subsequent to the expiration of the six month time limit as the limitation action proceeds.

Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C.A., which incorporates and modifies 46 U.S.C.A. § 185, sets forth the requirements for instituting a limitation of liability action. A comparison of these statutes indicates a legislative intent to codify the jurisprudential interpretation of § 185 that only the complaint for limitation of liability need be filed within six months of written notice of a claim.

Rule F recognizes the judicial interpretation of 46 U.S.C.A. § 185 in two ways. First, Rule F places the requirements of filing a claim and posting security in separate sentences, whereas 46 U.S.C.A. § 185 contained both requirements in one sentence. Under Rule F it is only the filing of the complaint which is subject to the six month time limit, not the posting of security. Second, under Rule

F(7) any claimant may demand that security be increased on the ground that it is less then the value of the owner's interest in the vessel. Rule F(7) does not contemplate dismissal of the limitation action in the event additional security is ordered after expiration of the six month period.

If this case were to be reviewed and its holding reversed, the practical effect would be to encourage claimants to await the expiration of the six month period before challenging the adequacy of the security, for a successful challenge to the security could result in dismissal of the limitation action. Such a result would be inconsistent with the statutory scheme, the jurisprudence, and the administration of equity in an Admiralty Court.

CONCLUSION

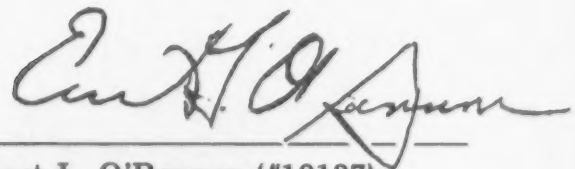
The statutory language at issue in this case is not ambiguous. It provides clearly that the complaint for limitation of liability be filed within six months of receiving notice of a claim. Guey not only filed her complaint within six months, she also filed an affidavit stipulating to the value of her interest in the vessel within the period. The statute provides a procedure for contesting complainant's valuation of her interest in the vessel. The court is granted discretion in determining the adequacy of security and is authorized to order modifications. Absent from the statute is any notion that dismissal of a limitation action is appropriate when it is subsequently determined that the vessel had value and security is required, or that an increase in security is warranted.

The conflict which Petitioner claims to see in cases emanating from the Second and Fifth Circuit does not exist.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BIENVENU, FOSTER, RYAN & O'BANNON

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1995, a true and correct copy of the foregoing Response to Petition for Writ of Certiorari was mailed, postage prepaid to the following:

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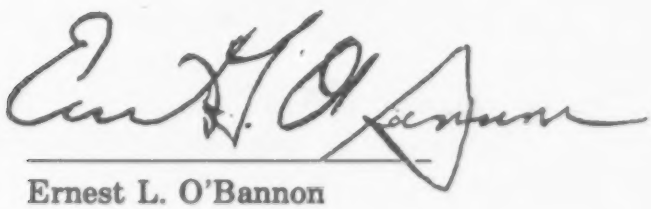

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